IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

FRIDAY, THE 23RD NOVEMBER 2007 / 2ND AGRAHAYANA 1929

S.T.Rev.No.169 of 2004

T.A.NO.306/2000 & C.O.NO.41 OF 2000 OF THE KERALA SALES TAX APPELLATE TRIBUNAL, ADDL. BENCH, KOZHIKODE, ORDER DATED 28.10.2003 (ASSESSMENT YEAR 1996-97).

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PETITIONER/RESPONDENT/APPELLANT/ASSESSEE:-

M/S. PINARAYI CARPENTARY & BLACK SMITH
WORKERS' INDUSTRIAL CO-OPERATIVE SOCIETY LTD.,
PACHAPOIKA P.O.,
KUTHUPARAMBA,
KANNUR DISTRICT,
REPRESENTED BY ITS PRESIDENT.

BY ADV. SRI.M.SASINDRAN
SRI.T.P.ELDHO

RESPONDENT/APPELLANT/RESPONDENT/REVENUE:-

STATE OF KERALA,
REPRESENTED BY THE SECRETARY (TAXES),
THIRUVANANTHAPURAM.

BY SPECIAL GOVERNMENT PLEADER SRI.VINOD CHANDRAN.

THIS SALES TAX REVISION HAVING BEEN FINALLY HEARD ON 23/11/2007, ALONG WITH S.T.REV.NO.319 OF 2004, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:-

H.L.Dattu, C.J. & K.M.Joseph, J.

S.T.Rev.Nos.169 of 2004 & 319 of 2004

Dated, this the 23rd day of November, 2007

ORDER

H.L.Dattu,C.J.

These Sales Tax Revisions pertain to the assessment years 1996-97 and 1997-98 respectively.

(2) The parties are common in both these revision petitions. Therefore these revision petitions are clubbed, heard and disposed of by this common order.

(3) The only issue that would arise for our consideration and decision is, whether the activity of the petitioner/assessee is sale of goods or is it in the nature of works contract. If we hold that the activity of the petitioner in supplying the Bank Counters to the specification of the Bank is in the nature of sale of Bank Counters, then the petitioner would be entitled for exemption under a notification issued by the State Government. If we hold otherwise, then the assessee would go out of the exemption notification and thereby he would not be entitled for the exemption from payment of sales tax.

(4) The assessee is a Khadi and Village Industrial unit. It is registered, both under the Kerala General Sales Tax Act, 1963 ("KGST Act" for short) and Central Sales Tax Act, 1956 ("CST Act" for short).

(5) Initially, the assessing authority had completed the assessment for the assessment year 1996-97 and had granted total exemption on the entire turnover of the dealer/assessee. On further scrutiny of the assessment records, the assessing authority was of the opinion that a particular item has escaped assessment and, accordingly, had initiated proceedings invoking his powers under Section 19 of the Act and had brought

to tax the sale of Bank Counters to the Banking institutions as an item which is not eligible for exemption under the notification issued by the State Government. So far as the assessment for the year 1997-98 is concerned, the assessing authority has refused to accept the return filed by the assessee and has proceeded to pass an order fixing the tax liability of the petitioner by disallowing the claim for exemption under the aforesaid notification. Aggrieved by the orders so passed by the assessing authority dated 3.4.2000 and 17.10.2002 respectively, the assessee has preferred appeals before the Appellate Assistant Commissioner, Kannur in S.T.A.Nos.365 of 2000 and 898 of 2002. The first appellate authority has allowed the appeals by orders dated 11.8.2000 and 3.3.2003. According to the appellate authority, the supply of Bank Counters to the specification of the customer would still be a “sale” and it would not fall within the meaning of the expression “works contract”. Therefore, it was of the opinion that the sale of Bank Counters to the customers is eligible for exemption under the notification issued by the State Government.

(6) State, being aggrieved by the orders so passed by the first appellate authority, had carried the matter by way of second appeal before the Tribunal in T.A.Nos.306 of 2000 and 248 of 2003 for the respective assessment years. The assessee also filed a Cross Objection in C.O.No.41 of 2000 (in T.A.No.306 of 2000) in respect of the assessment year 1996-97 and a second appeal in T.A.No.234 of 2003 in respect of the assessment year 1997-98 challenging the levy of tax, before the Tribunal. The Tribunal by its orders dated 28.10.2003 and 5.5.2004 allowed the State appeals and also the assessee's appeal with regard to levy of tax at the rate of 2.5% on the purchase turnover of goods and has rejected the Cross Objection of the assessee. Aggrieved by the aforesaid orders so passed by the Tribunal, the assessee is before us in these revision petitions.

(7) The assessee has raised the following questions of law for our consideration and decision. They are as under:

> "(i) Whether the Appellate Tribunal was right in adjudicating the matter without due regard to the question as to burden of proof in disputes relating to works contract?
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> (ii) Whether on the facts and in the circumstances of the case and in the light of Government of Andhra Pradesh Vs. Guntar Tobacco (AIR 1965 SC 1396) the Appellate Tribunal ought not to have held that it was the burden of respondent - State to show that the work carried out by the assessee was works contract and they have not discharged their burden?
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> (iii) Whether the appellate Tribunal ought not to have treated supply of Bank Counters as deemed sale as the Bank Counters had individual existence before its transfer.
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> (iv) Whether the Appellate Tribunal was proper in approaching the matter casting the burden on the petitioner?
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> (v) Whether the Appellate Tribunal ought to have found that work done by the petitioner was not one found falling under the definition of 'work contract' under section 2 (XXIX - a) of the KGST Act?"

(8) The admitted facts are that the assessee is a Village industry. The sale effected by the Village industry is exempted from payment of tax in view of the notification issued by the State Government. The exemption notification carves out an exception. The exception is that if the assessee executes a works contract, then it is not eligible and not entitled for exemption under the notification.

(9) In the present case, the assessee, pursuant to the agreement between him and the customer and further in accordance with the specification of the customer, has manufactured Bank Counters, interior decorative materials, etc. and thereafter has installed the Bank Counters in the customers' place and while doing so, has used wood, plywood, laminated

sheet, Aluminium railings, etc.

(10) The Bank Counters and decorative materials are goods which are not sold in open market. They are manufactured only at the specification of the customer. After such manufacture, they are erected and installed in the customer's premises to the satisfaction of the customer. The manufacture, erection and installation of the Bank Counters as per the agreement between the parties certainly would fall within the meaning of the expression works contract. Therefore, the transaction of the assessee with the Bank would certainly fall under Section 5(1)(iv)(b) of the Act.

(11) The Tribunal is the last fact finding authority. After going through the nature of the contract between the parties, the Tribunal has come to the conclusion that the transaction of the assessee with its customer for the supply of Bank Counters is in the nature of works contract. At this stage, it would be useful to refer to the decision of the Apex Court in the case of **Hindustan Shipyard Ltd. vs. State of Andhra Pradesh,** 119 STC 533, wherein the court has stated, that, the character of a transaction is defined by the nature of the contract entered into by the parties. The nature of the contract depends upon the intention of the parties as reflected in the terms and conditions of the contract documents. The nature of the contract is decided on the totality of its terms and conditions, i.e. scope and obligation of the parties, contract value and payment terms, insurance coverage, transfer of ownership or title in goods supplied, liquidated damages whether restricted to supply value or not, etc.. Thus the nature of the contract is predominantly based on facts rather than being a question of law. It is the nature of the contract which is a deciding factor to determine whether the transaction between the parties is a contract of sale or works contract. In our view, the Tribunal rightly applying the tests which is laid down by the Apex Court has held that the contract for

supply and erection of Bank Counters and other decorative items is a works contract and exigible to payment of tax. Therefore, in our view, the interference with the impugned order is not called for. Accordingly, the questions of law framed by the assessee requires to be answered against the assessee and in favour of the Revenue.

All pending interlocutory applications are dismissed.

Ordered accordingly.

H.L.Dattu
Chief Justice

K.M.Joseph
Judge

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